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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROOTS READY MADE GARMENTS CO. W.L.L., Plaintiff, v. THE GAP, INC., a/k/a, GAP, INC., GAP INTERNATIONAL SALES, INC., BANANA REPUBLIC, LLC, and OLD NAVY, LLC, Defendants.	Case No. C 07 3363 CRB PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT Date: August 29, 2008 Time: 10:00 a.m. Place: Courtroom 8, 19th Floor Judge: Charles R. Breyer **Trial Date: October 6, 2008**

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SUMMARY OF ARGUMENT

In an attempt to avoid responsibility for breaching its obligations under a clear oral contract supported by the actual payment of $6 million, Gap distorts the factual record and advances a series of legal arguments that ask the court to blind itself to the underlying business and economic reality. Three witnesses (one of whom was the president of Gabana at the time of the deal) testified to the exact same business deal between Gap and Roots: Roots would pay $6 million for out-of-date and defective Gap merchandise and receive in return the right to sell first-line Gap merchandise in the Arabic-speaking countries of the Middle East and North Africa.

Gap chose to implement the deal through Gabana, a British shell company with no garment industry experience, no presence in the Middle East, no assets, no distribution network, and only one professional employee, a former banker based in a small office in Switzerland. Gap itself called Gabana a "mom and pop operation," and no one involved in the deal seriously believed that Gabana was anything more than a pass through entity for the transaction between Gap and Roots. Roots accepted Gap's offer, by making a required $1 million down payment.

Gap's main excuse for avoiding its bargained for responsibilities to Roots is to argue that the written agreements Gap entered with Gabana to document its role as an intermediary – contracts Roots did not negotiate, and never even saw before performing under its agreement with Gap – bars Roots claims. But the fact record shows that Francois Larsen and Gabana did not act as the agents of Roots in the negotiation of Gabana's agreement with Gap, and that Roots knowledge of the negotiation was limited to a few conversations. When Roots actually saw the Gabana contract, it immediately recognized that it did not capture its agreement with Gap and refused to sign a mirror agreement. Over a two-year period, all the parties performed precisely in accordance with the oral agreement. Under these circumstances, the effort to avoid the oral contract by virtue of the parol evidence rule is simply contradicted by the facts. Moreover, the evidence shows Gap itself interpreted the Gabana contract to permit Roots to resell merchandise, contradicting the basic premise of Gap's parol evidence analysis that Roots acting as a distributor was inconsistent with the Gabana agreement.

Gap's other attempts to overcome Roots' contract claims also fail. The record demonstrates that the essential elements of both contracts at issue were agreed to by the parties or supplied by subsequent performance. Gap is estopped from asserting a statute of frauds defense because it induced Roots "seriously to change its position" in reliance on the existence of the oral agreements. The record also establishes a claim for fraud because Gap's promises to grant Roots ISP – and later franchise – rights were false when made, and because Gap mislead Roots concerning the purpose of the ISP program. Gap offers no serious argument for dismissal of Roots' statutory claim for "unfair" business practices. Contrary to Gap's argument, this broad equitable claim is not derivative of Roots' tort and contract claims, and should be sustained even if the other claims are dismissed.

For all of these reasons, and others discussed below, Gap's Motion for Summary Judgment should be denied.

FACTUAL BACKGROUND

I. Gap Seeks To Liquidate 1.7 Million Pieces of Excess Inventory.

This action arises from Gap's[1] almost desperate efforts to rid itself of a large inventory of outdated "excess inventory," also known as "OP" for "overproduction," [redacted] Exh. A, 177:11–18.[2] [redacted] Exh. B, 99:18–24. [redacted] Exh. A 65:22–66:1.

In 2001, Gap transferred a large volume of OP inventory to a French company, Solka S.A. ("Solka"). Exh. C, 17:3-19:4. Gap sent the inventory to Solka on an open account basis, without requiring immediate payment. *Id.*, 18:6-19:4. After attempting with limited success to liquidate the inventory, Solka was left with approximately 1.7 million pieces stored in Dubai, United Arab Emirates. *Id.*, 20:4-14. Following a change in Gap's management, in 2002, Gap demanded that Solka pay immediately for the remaining inventory. *Id.*, 22:2-22. [redacted] Exh. D, 22:17-20. Gap requested that Solka keep the goods until another purchaser could be identified, rather than return them to Gap. Exh. C., 23:6-10.

A. Solka and Gabana Identify Roots As A Potential Purchaser of the Dubai OP Inventory.

Solka retained Francois Larsen, a Swiss national with an accounting and finance background, to assist with the transaction relating to the OP inventory. Larsen is the principal of Gabana Gulf Distribution ("Gabana") – a shell company registered in the United Kingdom, with its principal place of business in Geneva, Switzerland. Gabana had no employees other than Mr. Larsen and a secretary. *Id.*, 32:25-33-2. Larsen himself had no experience in the garment industry. 33:11-13. When asked whether Gabana had any facilities in the Middle East, Solka's principal, Jacques Fabre, who at one point served as the President of Gabana, responded as follows:

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[1] Defendants The Gap, Inc., Gap International Sales, Inc., Banana Republic, LLC, and Old Navy, LLC are collectively referred to herein as "Gap."

[2] All Exhibits cited herein are exhibits to the accompanying Declaration of Bradley J. Nash, unless otherwise stated.

"A. (Laughs). No. . . . They had an office in Geneva, but that's all." *Id.*, 33:7-10. When asked whether Mr. Larsen had any expertise selling garments in the Middle East, Mr. Fabre was similarly unequivocal: "A. (Laughs). We are wasting . . . time. No." *Id.*, 28:1–2. [redacted] Exh. B, 27:5-8. [redacted] Exh. E, 47:1-10. [redacted] Exh. F, 10:8. Roots' CEO was Ashraf Abu Issa, a respected retail executive in Qatar. Abu Issa Decl. ¶ 1. [redacted] Exh. E, 47:2-6. Roots was initially unwilling to purchase such a large volume outdated garments. Abu Issa Decl. ¶¶ 2-3; Exh. F, 142:20–24. Larsen indicated that if Roots purchased the OP inventory, Gap would grant Roots the right to sell first-line merchandise in the Middle East under Gap's International Sales Program ("ISP"). Abu Issa Decl. ¶ 3.

B. Gap Offers to Grant Roots The Right to Sell First-Line Gap Merchandise If Roots Purchases the Dubai OP Inventory For $6 Million.

Larsen arranged for Al-Thani and Abu Issa to speak by phone with Jim Bell, the director of Gap's outlet division, who was responsible for disposing of the enormous stock of excess inventory. During an hour-long call, Bell conveyed directly to Roots Gap's offer to sell the OP inventory. [redacted] Exh. E, 44:19, 47:11–48:3; *accord* Exh. F, 130:23–24; Exh. C, 24:2-3. [redacted] Exh. E, 47:20–23.

Several other negotiation sessions followed, during which Roots and Gap negotiated the terms of Gap's offer, including (1) the price for the OP merchandise, (2) the terms of the letter of credit by which Roots would pay for the merchandise; (3) the brands Roots would sell under the ISP program; (4) the countries that Roots would be allowed to sell in; (5) the environment in which

Roots would sell the merchandise (*i.e.*, in multi-brand stores); and (6) the "mechanism" for placing orders. Abu Issa Decl. ¶ 5; Exh. E, 43:23–44:13; 49:20–50:22.

The negotiated price, $6 million, exceeded the market value of the OP inventory. Abu Issa Decl. ¶ 5. To induce Roots to make the purchase, Bell presented the ISP program as a tremendous opportunity that, over time, would enable Roots to recoup its substantial investment in the OP inventory. Abu Issa Decl. ¶ 6. According to Bell, Roots would be permitted to sell ISP merchandise both in Roots' own multi-brand stores in Qatar, and in other Arabic-speaking countries in the Middle East and North Africa, subject only to Gap's approval of specific retailers in these countries. *Id.* ¶ 5. Bell said that the ISP rights would also assist Roots in selling the OP inventory, since retailers could be persuaded to purchase the outdated goods if they were also offered in-season merchandise. *Id.* ¶ 6.

[redacted] Exh. E, 62:6-12.

[redacted] Exh. F, 131:19–132:4; *accord id.* at 145:14–21.

C. Gap Proposes That Gabana Serve As An Intermediary, And Executes Written Agreements With Gabana To Document Gabana's Role.

[redacted] Exh. F, 82:6-10; Exh. E, 127:3–128:6 & Errata Sheet. To address this concern, Gap proposed that it be allowed to perform its obligations through an intermediary, Gabana, such that Gap would sell the OP inventory (and later the ISP merchandise) to Gabana, which would then simultaneously resell the merchandise to Roots. Abu Issa Decl. ¶ 9. Roots consented to this arrangement, but only with the understanding that it would in no way extinguish or modify Gap's promises to Roots. *Id.*

On May 12, 2003, Roots and Gabana executed a letter of understanding ("LOU"). Punak Decl., Ex. 13. The LOU discussed the parties' plan to enter into distribution agreements for OP and ISP, which would reflect the content of agreements to be executed by Gap and Gabana. Abu

Issa Decl. ¶ 10. The LOU, however, was contingent on (1) Roots being satisfied that the Gap-Gabana agreements reflected the terms of the offer Gap had made to Roots, and (2) the merger of Gabana and Roots into one company. *Id.*; Exh. E 29:17-19, 75:20-22. Neither contingency occurred, and the written agreements between Gap and Gabana were never executed. Abu Issa Decl. ¶ 10.

On May 13, 2003, Gap executed two written agreements with Gabana to document its role as an intermediary. The agreements ("Gap-Gabana Agreements") appointed Gabana as a non-exclusive distributor for OP merchandise ("OP Agreement") and ISP merchandise ("ISP Agreement"). Punak Decl., Ex. 14, 15. Roots was not a party to the Gap-Gabana agreements, and it was never shown a copy of the agreements before they were executed.[3] Abu Issa Decl. ¶ 12. Gap and Gabana renewed the ISP agreement in September 2004. [redacted] Exh. B, 189:18-20. [redacted] Exh. E, 124:15-23.

D. Roots Accepts Gap's Offer – And Establishes A Binding Oral Contract – By Making A Payment Toward The OP Inventory, and Bell Reaffirms the Oral Agreement.

On May 14, 2003 – the day after the execution of the Gap-Gabana agreements, and after being reassured that the terms of the oral agreement were still in effect – Roots accepted Jim Bell's offer by tendering a $1 million down payment toward the purchase of the OP inventory. Abu Issa Decl. ¶ 14. Roots made the down payment by means of a wire transfer to Gabana; Gabana simultaneously transferred the identical amount to Gap. Exh. G; Exh. H. Gap was aware of, and indeed requested, this method of payment. Abu Issa Decl. ¶ 14. As Gap was aware, Gabana did not make any profit from the sale of the OP inventory to Roots; instead Gabana's role was purely to serve as an intermediary to address Gap's concern about being seen doing business directly with

[3] Roots had no direct participation in the negotiation of the written agreements between Gap and Gabana, but Larsen did inform Abu Issa about the negotiation of the provisions of the agreements concerning exclusivity and advertising restrictions. Abu Issa Decl. ¶ 13. Abu Issa asked Larsen to convey to Gap Roots' comments concerning the content of the written agreements. Although Larsen served as a "messenger" between Gap and Roots, he was not subject to Roots' control and had no express or implied authority to bind Roots to any agreement. *Id.* ¶ 14. Roots never agreed that Larsen would act as Roots' agent. *Id.*; Exh. E, 36:25–37:2.

a Middle Eastern entity. *Id.*; Exh. I. [redacted]

Several days after Roots made the down payment on the OP inventory, Larsen sent Abu Issa copies of Gap's OP and ISP agreements with Gabana for the first time. Abu Issa Decl. ¶ 15; Punak Decl., Exs. 31, 32. When Abu Issa reviewed the agreement, he noted that certain of the terms differed the terms Roots had negotiated with Gap. *Id.* For example, the rights Gap granted to Gabana were non-exclusive, and the agreements contained strict advertising restrictions that Abu Issa believed would hamper efforts to sell the merchandise. *Id.* Mr. Abu Issa discussed these concerns with Jim Bell. *Id.* ¶ 16. Bell represented that the Gap-Gabana agreements were only "temporary" and that the terms could be improved in the future. *Id.* Roots did not execute the back-to-back agreements with Gabana that were contemplated by the LOU, choosing instead to rely on its separate agreement with Gap. *Id.* ¶ 16; Exh. E, 69:1-21.

In the meantime, Bell assured Abu Issa that the oral agreement between Roots and Gap remained in effect. *Id.* He further stated that Roots was not bound by the terms of the written agreements, and could rely instead on Gap's oral offer. *Id.* In reliance on Bell's representations, Roots paid the remaining $5 million balance of the purchase price by means of back-to-back letters of credit from Roots to Gabana and Gabana to Gap. Exh. J; Exh. K. As with the down payment, Gabana served merely as a conduit for Roots' payment to Gap, and made no profit from the transaction. Abu Issa Decl. ¶ 18.

E. In June 2003, Roots Agrees to Develop a ISP Retail Network in the Middle East In Exchange For Gap's Promise To Grant Roots ISP Rights.

[redacted]

Id., 197:20–22.

[redacted]

Id., 173:12–174:20.

[redacted]

[redacted] *Id.*, 197:16-23.

F. Gap and Roots Perform In A Manner Consistent With The Terms of the Oral Agreements.

In the two years following Roots' purchase of the OP inventory, Gap and Roots performed in a manner consistent with the oral agreement, demonstrating the parties' intent that Roots would funcation as a distributor of Gap merchandise in the Arabic-speaking countries of the Middle East and North Africa.

Roots, with Gap's approval open two multi-brand stores in Doha, Qatar, which began selling ISP and OP merchandise in 2004. Although Gap now asserts that Roots resale of ISP merchandise to other retailers contradicts the terms of the Gap-Gabana agreements, Defs. Mem. at 6, 13, it never took that position prior to this litigation. To the contrary, Gap (i) shipped the entire OP inventory, and later ISP merchandise, to Roots' warehouse in Dubai for distribution in various territories; (ii) approved Roots' resale of OP and ISP merchandise to other approved retailers; and (iii) routinely had discussions with Roots about expanding Roots' ISP sales to retailers in territories outside Qatar.

1. *Gap Ships The OP Inventory Directly To Roots With Knowledge That Roots Would Re-Sell The Inventory To Retailers in Other Territories.*

[redacted] Exh. D, 33:22-34:4. [redacted] Exh. A, 69:16–18. In 2003, [redacted] Exh. B, 61:3-10; Exh. A, 78: 1-10. Contemporaneous documents in the record further demonstrate Gap's awareness that Roots would be reselling the OP inventory to retailers located outside of Qatar:

- [redacted] Exh. L.
- [redacted] Exh. M.
- [redacted] Exh. N.

2. *Gap Routinely Discusses ISP Distribution Outside Qatar with Roots.*

Over the course of the parties' relationship, Gap routinely discussed directly with Roots the subject of ISP distribution outside of Qatar. To cite a few examples:

- [redacted] Exh. O; Exh. B, 122:8-12.
- [redacted] Exh. P.
- [redacted] Exh. Q. [redacted] Exh. B, 123:13-16.

3. *Gap Is Aware of And Approves Roots' Resale of ISP Merchandise to The Approved Retailer in UAE.*

[redacted] Exh. A, 138:22–24.[4] Gap permitted Roots to sell ISP merchandise it purchased through Gabana to an approved retailer in the UAE. [redacted] Thus, Gap was well aware that Roots was reselling Gap ISP merchandise to A.A. Turki, which in turn resold it to RSH for retail sale in the UAE. Exh. B, 165:4-9. Ehab Al Sharif, an executive at A.A. Turki, confirmed the complete transparency to Gap of the relationship between Roots, A.A. Turki and RSH. Exh. S, 15:8–16:18.

G. Gap Stalls In Approving New ISP Territories and Retailers, But Continues to Assure Roots That It Will Fulfill Its Contractual Obligation to Permit Roots to Sell First-Line Merchandise.

Roots was ready to proceed with ISP distribution in Lebanon, Saudi Arabia and other markets. Although Roots' retail operations in Qatar and UAE were successful, Gap failed to permit Roots to enter other markets within the agreed territory. [redacted] Exh. E, 174:18-20.

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[4] [redacted] Exh. A, 183:20; *see also id.* at 180:15–16 [redacted] Exh. A, 138:22–24.

[redacted] Exh. A, 80:13–16. In addition, the ISP program was never intended to generate profits, as Bell had suggested, but rather to protect Gap's international trademarks by conducting a minimal amount of business in foreign countries. [redacted] Exh. T, 16:10–22. [redacted] Exh. B, 15:21-24. [redacted] Exh. A, 102:4-10; Exh. E, 179:3-10. Had Roots understood the true nature of the program, it would never have agreed to purchase the OP inventory. Abu Issa Decl. ¶ 7.

H. Gap Changes Its Business Model in the Middle East and Promises to Make Roots Its Frachisee.

In late 2004 or early 2005, Gap informed Roots that it was considering changing its business model in the Middle East by establishing franchisees to operate stand-alone Gap stores. [redacted] Exh. F, 41:23–43:20, 61:8-12. [redacted] *Id.*, 45:12-16. [redacted] *Id.*, 48:20-22, 69:11–76:8.

Although Gap did eventually establish franchises in the Middle East, Roots was not made a franchisee. [redacted] Exh. A, 221:22–24.

I. Gap Wrongfully Terminates Roots' Right to Sell First-Line Gap Merchandise, And Falsely Promises To Cure The Breaches of Its Contractual Obligations To Roots.

On August 10, 2005, Gap terminated the ISP Agreement with Gabana. Punak Decl., Ex. 24. Because Gap had thus far provided the ISP merchandise for Roots' retail stores (and those of its retail partners in the UAE) solely through Gabana, the termination threatened to cut off Roots' access to the first-line Gap goods necessary to run the stores. [redacted] Exh. E, 16:24–18:25.

ARGUMENT

Summary judgment is proper only when a review of the record reveals "no genuine issue as to any material fact." Fed. R. Civ. P. 56(c). "Reasonable doubts as to the existence of material factual issue are resolved against the moving part[y] and inferences are drawn in the light most favorable to the non-moving party." *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000). So long as "a fair-minded jury *could* return a verdict for the plaintiff on the evidence presented," a defendant's summary judgment motion must be denied. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 252 (1986).

I. **The Record Supports Roots' First Contract Claim.**

A. The Evidence Establishes That Roots and Gap Entered Into A Binding Contract on May 14, 2003.

1. *The Parties Manifested Their Intent To Be Bound When Gap Accepted Roots' Down Payment for the OP Inventory.*

The record establishes that Gap and Roots entered into a binding oral contract on May 14, 2003 when Roots tendered, and Gap accepted, payment for the OP inventory. Gap's argument that Roots' *negotiations* with Gap in May 2003 did not result in an oral agreement, as "[n]either Roots nor Gap viewed the conversations . . . as constituting a binding contract" is beside the point. [redacted] Exh. E, 62:1-12 [redacted]

[redacted] *see also* Exh. F, 131:13–132:4 [redacted], 145:5-12 [redacted] Under California law, "[p]erformance of the conditions of a proposal . . . is an acceptance of the proposal," Cal. Civ. Code § 1584, and gives rise to a binding contract. *See Los Angeles Traction Co v. Wilshire*, 135 Cal. 654, 658-659 (1902) (offeror's promise to perform if the offeree will perform a particular act becomes binding when the offeree, in reliance on such a promise, does the required act). By accepting Roots' payment for the OP inventory, Gap manifested its assent to be bound by the terms of its offer to Roots. *See Snider v. Roadway Packaging Systems*, No. C-99-02728 CRB, 2000 U.S. Dist. LEXIS 4688 at *9 (N.D. Cal. Apr. 11, 2000) ("Mutual assent is typically manifested by means of the communication of an offer and an acceptance between the parties.").

2. *The Material Terms of the May 2003 Oral Contract Are Clear.*

Gap contends that the May 2003 agreement failed to "address and/or resolve material terms" and is therefore too "indefinite" to constitute a binding agreement. Defs. Mem. at 15. This argument fails because: (1) the May 2003 agreement contained all the material terms; and (2) any arguable "indefiniteness" was cured by the parties' performance.

The essential terms of the oral agreement were expressly delineated in Gap's offer to Roots, including: the price Roots would be required to pay for the OP inventory ($6 million); the consideration Roots would receive in exchange for the purchase (*i.e.*, the right to sell first-line ISP merchandise); and the territories to which those rights applied (all the Arabic-speaking countries). Abu Issa Decl. ¶ 5. The cases cited by Gap in which courts found that the alleged agreements failed for lack of definite terms bear no resemblance to the oral agreement between Roots and Gap.[5]

[5] For example, the agreements at issue in *Weddington Prods. v. Flick*, 60 Cal. App. 4th 793 (1998), and *Avalon Products, Inc. v. Lentini*, 98 Cal. App. 2d 177 (1950), unlike the oral contract here, *expressly* left material terms subject to future negotiation and agreement. In *Weisberg v. U.S. Dep't of Justice*, 745 F.2d 1476, 1493 (D.C. Cir. 1984), the court found that the absence of a duration term rendered an alleged consultancy agreement fatally uncertain. Central to

Even if certain terms of the agreement remained indefinite following the negotiations, such deficiencies were cured by the parties' performance. "[A]lthough an agreement may be indefinite or uncertain in its inception, subsequent performance by the parties under the agreement will cure this defect and render it enforceable." *Bohman v. Berg*, 54 Cal. 2d 787, 794-795 (1960) (internal citations omitted); *see also* Williston on Contracts § 4:11 (4th Ed.) ("even if the oral agreement prior to the act of performance did not constitute a contract, the subsequent tender of performance would amount to an offer, and the receipt of such performance without objection would operate as an acceptance of the offer"). Thus, Roots' payment of $6 million, Gap's acceptance of the payment and subsequent shipment of the OP Inventory directly to Roots' warehouse, and both parties' two-year course of performance during which both Gap and Roots performed in a matter consistent with the oral agreement (*see supra* at 6-8), clearly establish the existence of an enforceable agreement.

B. Roots Is Not Bound By the Written Agreements Between Gap and Gabana.

1. *Roots' Rights Are Not Derivative of the Gap-Gabana Agreements.*

Through selective citations to the record, Gap argues that Roots' rights with respect to Gap merchandise derive from Gap's written agreements with Gabana. Defs. Mem. at 10. Gap simply ignores the extensive testimony demonstrating that Roots traced its rights to a separate oral agreement with Gap. [redacted] Exh. E, 127:5-8. [redacted] Exh. F, 84:7-9 [redacted] *Id.*, 82:5-6.

Although, the parties initially intended to execute a back-to-back written contracts between Gap and Gabana and Gabana and Roots, the LOU between Roots and Gabana was never implement, and Roots never executed a written agreement with Gabana. Abu Issa Decl. ¶ 10.

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the holding, however, was the fact that the plaintiff claimed that he was entitled to be paid by the hour, and therefore the total amount of his consultancy fee – which had been the central focus of the parties' negotiations – could not be determined without a duration term.

Instead, after receiving assurances from Jim Bell that Gap's oral offer to Roots was in place – *i.e.*, that Roots would receive ISP rights in the Arabic-speaking countries in exchange for purchasing the OP inventory – Roots accepted the offer by making a $1 million down payment toward the purchase of the OP inventory, and later paying the remaining $5 million balance. Abu Issa Decl. ¶ 14. Gap wrests entirely out of context a statement in one of Roots' agreements to the effect that "Roots manages rights granted to Gabana Gulf Distribution . . . by GAP Inc," arguing that this shows Roots understood its rights to be derivative of Gabana. [redacted] Exh. U, 119:14–120:9.

2. *Larsen Had No Authority To Modify The Terms of Gap's Agreement With Roots.*

Gap asserts that Francois Larsen had actual or ostensible authority to modify Gap's agreement with Roots by executing a written agreement between Gap and Gabana. Neither theory is supported by the record.

"Agency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control." *Van't Rood v. County of Santa Clara*, 113 Cal. App. 4th 549, 571 (2003). There is no evidence in the record that Roots conferred upon Larsen the authority to act on its behalf. According to Abu Issa, there was "never any agreement that [Larsen] would act as an agent of Roots." Abu Issa Decl. ¶ 13. The testimony cited by Gap, Defs. Mem. at 11, at most shows that Larsen occasionally functioned as a "messenger" during the parties' negotiations by conveying information between Roots and Gap. Exh. E, 109:22-23. However, there is no evidence that Roots ever possessed the right to control Larsen's actions. [redacted] *Id.*, 36:16-18. *Van't Rood*, 113 Cal. App. 4th at 572 ("[I]n the absence of the essential characteristic of the right to control, there is no true agency. . . .") (internal

quotations omitted); *see also DeSuza v. Andersack*, 63 Cal. App. 3d 694, 699 (1976) (finding no agency where neither party was "asserting the right to control the other").

Nor was Larsen "imbued with ostensible authority," Defs. Mem. at 12, to bind Roots to any agreement that would limit its rights. In order to establish ostensible authority, the principal must intentionally communicate the existence of an agency relationship to a third person, or negligently cause a third person to believe that there is an agency relationship. *See Howell v. Courtesy Chevrolet*, Inc. 94 Cal. Rptr. 33 (1971). Gap argues that "Abu Issa was aware in May 2003 that Larsen had represented to Gap that Roots' principals . . . were 49% owners in Gabana," and therefore "Gap had no reason to believe that Larsen lacked authority to enter into written agreements that would affect Roots' rights." Defs. Mem. at 12. (emphasis added). This is incorrect. Abu Issa testified that he was aware Larsen informed Gap that the ownership of Gabana "would be changed" following a proposed merger with Roots. But the merger never occurred, and Roots never represented to Gap that it had. Gap continued to deal independently with Gabana and Roots, recognizing that they were two separate entities. Abu Issa Decl. ¶ 11. In any event, *Larsen's* representations to Gap are irrelevant to the question of ostensible agency, as the conduct of the purported agent cannot not establish agency. *See Mosesian v. Bagdasarian*, 260 Cal. App. 2d 361, 367 (1968).[6]

C. The Evidence Shows That Parol Evidence Rule Has No Application In This Case.

Gap's argument that the evidence of Roots' oral contract is inadmissible under the parol evidence rule fails for three separate reasons: (1) the parol evidence rule is inapplicable under the established facts; (2) there is no inconsistency between the oral contract and the Gap-Gabana agreements as interpreted by Gap; and (3) Gap is estopped from enforcing the Gap-Gabana in a manner that would prejudice Roots' rights.

1. *The Parole Evidence Does Not Apply Because Roots Is Not A Party to the Gap-Gabana Agreements.*

[6] At a minimum, "ostensible authority is for a trier of fact to resolve.... [It] should not ... [be] decided by an order granting a summary judgment." *American Cas. Co. of Reading, Pennsylvania v. Krieger*, 181 F. 3d 1113 (9th Cir. 1999) (internal quotations omitted).

Whether and under what circumstances the parol evidence rule can be invoked by or against a non-party is an unresolved question under California law. *See, e.g., Hess v. Ford Motor Co.*, 27 Cal. 4th 516, 526 n.2 (2002) (declining to "reach the issue of whether a stranger to the contract may invoke the parol evidence rule.") Some cases suggest that the rule precludes a non-party from introducing evidence to alter or very the terms of a written agreement. Roots, however, does not seek to alter, interpret, or enforce the Gap-Gabana Agreements; it brings a claim for breach of a separate oral contract between Roots and Gap. Gap cannot cite a single case that would permit it to avoid obligations under an oral contract by the simple expedient of entering into a written contract with a third party on the same subject matter.

The principal case applying the parol evidence rule to a non-party, *Kern County Water Agency v. Belridge Water Storage Dist.*, 18 Cal. App. 4th 77 (1993), is readily distinguishable and does not support the application of the doctrine in this action. In *Kern County*, a county water agency brought a declaratory relief action to resolve a dispute with its 14 member water districts concerning an amendment to a master water supply contract between the agency and the state, which was incorporated by reference in agreements between the agency and each of the member districts.

On the basis of the parol evidence rule, the trial court sustained the objection of two districts to extrinsic evidence offered by the other districts as to the parties' intent with respect to the amendment. The Court of Appeals affirmed, holding that, although the extrinsic evidence that the two districts sought to exclude technically pertained to contracts between other districts and the agency, "the facts of this case strongly support the power of any member district to invoke the parol evidence rule." *Id.* at 87. In so finding, the Court noted that the amendment as to which the two districts sought to introduce extrinsic evidence was incorporated by reference into the agreements of all of the member districts. As a result, "[t]he trial court could not interpret one member district's contract without affecting the contractual rights and obligations of all parties." *Id.* Here, by contrast, Roots is not a party to the Gap-Gabana agreements; the agreements are not

identical to the agreement between Roots and Gap; and admitting evidence of Roots' oral agreement with Gap will not affect the interpretation of the Gap-Gabana agreements.

2. *The Parol Evidence Rule Is Inapposite Because The Gap-Gabana Agreements Do Not Contradict Gap's Oral Agreement With Roots.*

The parol evidence rule is inapplicable for the additional reason that Roots' oral contract is not inconsistent with the Gap-Gabana agreements. Gap's obligations under its oral contracts included permitting Roots to sell first-line Gap apparel in its own retail stores. Abu Issa Decl. ¶ 5. Gap's termination of the ISP Agreement – and its subsequent failure to provide first-line merchandise to Roots by other means – constituted a breach of this contractual obligation. Gap does not suggest that this part of Roots' contract claim is in any way inconsistent with the Gap-Gabana agreements.

As for Roots' claim that it had the contractual right to resell OP and ISP merchandise outside of Qatar, Gap points to no provision of the Gap-Gabana agreements that expressly prohibited Roots, as an authorized retailer, from reselling such merchandise to other Gap-approved retailers for sale in authorized stores. Gap's two-year course of performance under the agreements demonstrates that Gap understood Roots' role as a retailer to include not only sales to consumers but also sales to other retailers. For example, [redacted] *See supra* at 7; *Nanakuli Paving & Rock Co. v. Shell Oil Co.*, 664 F.2d 772, 785 (9th Cir. 1981) ("actual performance of a contract" is "the most relevant evidence of how the parties interpreted the terms of that contract.").

3. *Gap Is Estopped From Asserting An Interpretation Of The Gap-Gabana Agreements that Prejudices Roots' Rights.*

Even if the Gap-Gabana contracts could be interpreted in a manner prejudicial to Roots' rights, Gap is estopped from asserting that interpretation. "Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct,

permitted to contradict it." Cal. Evid. Code § 623. By its conduct and affirmative representations over the course of a two-year business relationship, Gap deliberately induced Roots to expend considerable money and resources in reliance on the promise that Roots was entitled to purchase first-line Gap merchandise from Gap (through Gabana) for re-sale (1) directly to consumers in Roots own retail stores in Qatar and (2) to other Gap-approved retailers in other territories. Thus, even if the Gap-Gabana agreements somehow precluded Roots from re-selling Gap apparel to other retailers – and as explained above, they did not – the doctrine of estoppel would bar Gap from enforcing this prohibition. *See Wagner v. Glendale Adventist Med. Ctr.*, 216 Cal. App. 3d 1379, 1388 (1989) ("When one party has, through oral representations and conduct or custom, subsequently behaved in a manner antithetical to one or more terms of an express written contract, he or she has induced the other party to rely on the representations and conduct or custom. In that circumstance, it would be equally inequitable to deny the relying party the benefit of the other party's apparent modification of the written contract.").

D. The Statute of Frauds Does Not Bar Roots Oral Contract Claims.

Gap is also estopped from raising a statute of frauds defense to Roots' oral contract claims. Estoppel applies where the defendant induced the plaintiff "seriously to change his position in reliance on the contract," *or* where invalidating the contract would unjustly enrich the defendant. *Monarco v. Lo Greco*, 35 Cal.2d 621, 623 (1950); *see also Allied Grape Growers v. Bronco Wine Co.*, 203 Cal. App. 3d 432, 442 (1988) (defendant equitably estopped from invoking statute of limitations to invalidate an oral contract for the sale of grapes). Both elements are satisfied here.

Gap argues that Root has suffered no "unconscionable" injury, since "virtually *all* of the alleged acts of reliance on Roots' part occurred after it had received a copy of the Gap-Gabana agreements and had been informed that the agreement did not include all of the terms it had hoped for." Defs. Mem. at 16. Gap ignores the fact that Roots had already paid a $1 million down payment toward the purchase of the OP inventory before it was shown a copy of the Gap-Gabana agreements. Moreover, even after Roots saw the written agreements, Jim Bell confirmed that Gap's oral agreement with Roots remained in place. In reliance on the existence of the oral

agreement, Roots was further induced "seriously to change [its] position" by paying an additional $5 million for the OP, and by proceeding to expend considerable money and resources developing an ISP retail network. By the same token, Gap was unjustly enriched when it retained these and other benefits Roots bestowed on it, while denying Roots the ISP rights it promised in exchange.

II. The Record Supports Roots' Second Contract Claim.

The record establishes that Gap and Roots entered into a second oral agreement during a collection presentation in San Francisco in June 2003. Pursuant to that agreement, Gap promised to grant Roots ISP rights, if Roots would develop an ISP retail network in the Arabic-speaking world. *See supra* at 5-6. Roots performed under the contract by, *inter alia*, establishing a warehouse, visiting "many countries" to explore potential markets, vetting numerous local retailers, and hiring a large staff. Exh. E, 197:1-23.

Gap argues that this claim, like the first oral contract claim is barred by statute of frauds, and the parol evidence rule, and is "fatally vague." Each of these arguments fails for the reasons explained above at p. 11-12. Gap argues that the second oral contract claim lacks adequate consideration because, Gap had already promised to grant Roots ISP rights under the earlier contract in May. This court previously rejected a similar argument, when it found that there was "a triable issue whether the promise to pay for Gap's OP was intended to serve as consideration for both the contract with Gabana and the contract with Gap." 1/28/2008 Order at 6 n.1.

III. The Record Supports Roots Claim for Breach of the Covenant of Good Faith and Fair Dealing.

"California law implies a covenant of good faith and fair dealing in every contract," including Roots' oral contracts with Gap. *Mundy v. Household Finance Corp.*, 885 F.2d 542, 544 (9th Cir. 1989). Gap breached this implied covenant by, *inter alia*, (1) terminating Roots' ISP rights (and failing to otherwise provide first-line merchandise to Roots for re-sale in the Middle East) before Roots could reasonably have made a return on its substantial investment in the OP inventory; and (2) failing to consider in good faith Roots' proposals to expand its ISP operations in the territories that Gap promised to it. Exh. V, 111:6–113:1 [redacted]

[redacted] The record shows that Gap's conduct "unfairly interfered with [Roots'] right to receive the benefits of the contract," establishing a claim for breach of the implied covenant of good faith and fair dealing. *See Oculus Innovative Sciences, Inc. v. Nofil Corp.*, No C 06-01686 SI, 2007 WL 2600746, at *4 (N.D. Cal. Sept. 10, 2007).

IV. The Record Supports Two Separate Claims for "Unfair" and "Unlawful" Practices Under Cal. Bus. & Prof. Code § 17200.

Gap's assertion that *both* of Roots' UCL claims are derivative of the contract and fraud counts is flatly contradicted by established law. A claim for "unfair" business practices does not require any underlying predicate violation of law. To the contrary, "a practice may be deemed unfair even if not specifically proscribed by some other law." *Blennis v. Hewlett-Packard Co.*, No. C 07-00333 JF, 2008 WL 818526, at *6 (N.D. Cal. Mar. 25, 2008) (citation omitted); *see also Progressive W. Ins. Co. v. Yolo County Superior Court*, 135 Cal. App. 4th 263, 286 (2005) (upholding 17200 claim for "unfair" business practices where complaint did not state a claim for breach of contract, or breach of the implied covenant of good faith and fair dealing).

"The determination of whether a particular business practice is unfair . . . involves an examination of its impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer." *Motors, Inc. v. Times Mirror Co.* 102 Cal. App. 3d 735, 740 (1980). The record establishes a basis for the claim: Gap induced Roots to purchase the OP inventory for an above-market price, and to expend money and resources liquidating the inventory and developing a retail network for Gap products in the Middle East, but then cut-off Roots' ability to sell first-line Gap merchandise before it could even recoup its investment. Moreover, Gap had no legitimate business justification for its conduct: Its apparent motivation for was to rid itself of quickly of outdated merchandise that it viewed as a liability.

V. The Record Supports Roots' Common Law Fraud (Count Six)

The record demonstrates that Gap defrauded Roots by falsely promising to grant it distribution rights in the Middle East with no intent of doing so, and by failing to disclose material facts uniquely within Gap's knowledge concerning the ISP program.

Under California law, "where a promise is made without [the intention to perform], there is an implied misrepresentation of fact that may be actionable fraud." *See Lazar v. Superior Court*, 12 Cal. 4th 631, 638 (1996). The record shows that Gap promised to grant Roots ISP rights in the Middle East, and later promised to make Roots a franchisee in the same territory.[7] *See supra* at 2-3, 9. Gap's own witness have admitted, however, that Gap never intended to grant Roots ISP rights, and never actually considered making Roots Gap's franchise. *See supra* at 9. These promises, which were false when made, are actionable as fraud.

Gap argues that any misrepresentations pre-dating the September 1, 2004 ISP Agreement – such as Bell's false promise to grant Roots ISP rights – are barred by the parol evidence rule. Although a party to a contract may not assert a fraud claim based on "prior or contemporaneous statements at variance with the terms of a written integrated agreement," 1/28/08 Order at 7, Roots is not a party to the Gap-Gabana agreements. Accordingly, while Gabana may be barred from asserting fraud claims at variance with the terms of its written agreement with Gap, Roots is not. To hold otherwise would allow any party to avoid liability for fraudulent promises to a party by unilaterally executing a contract on the same subject matter with a different party. Moreover, Gap's fraudulent promises to grant Roots the right to sell first-line Gap merchandise directly to consumers in its own retail stores in Qatar and to Gap-approved retailers in other territories were not inconsistent with the terms of the written agreements between Gap and Gabana. Thus, even if the parol evidence rule did apply, it would not bar Roots' fraud claim.

Even if the promise to grant Roots ISP rights had been true, Gap nevertheless defrauded Roots by presenting the program as "a tremendous opportunity for Roots to establish and grow a profitable retail network for Gap merchandise in the Arabic-speaking world." Abu Issa Decl. ¶ 6. Gap's witnesses now concede that Gap actually regarded the program as "commercially

[7] Gap's suggestion that the promise to make Roots a franchisee was too "vague" or "qualified" to be actionable, and that Roots cannot show detrimental reliance, are incorrect. Defs. Mem. at 21. Al-Thani testified that Young made an unequivocal promise that if Gap switched to a franchise model, it would make Roots the franchisee in the same territories where Roots was entitled to distribute ISP. *See supra* at 9. In reliance on that promise, Roots prepared a market study, and also traveled extensively in the region to investigate potential markets. *See id.*

irrelevant." The purpose of ISP was to protect Gap's foreign trademarks, "not to drive revenue or sales." Exh. T, 16:10-22. Gap attempts to avoid liability by arguing that "the failure to disclose a fact does not constitute fraud unless the defendant is legally bound to disclose it." Defs. Mem. at 20. However, "nondisclosure or concealment may constitute actionable fraud: . . . [1] when the defendant had exclusive knowledge of material facts not known to the plaintiff . . ., or [2] when the defendant makes partial representations but also suppresses some material facts." *LiMandri v. Judkins*, 52 Cal. App. 4th 326, 336 (1997). Because the ISP rights were to be the sole consideration exchanged for Roots' $6 million payment to Gap, the fact that the ISP program was intended for trademark protection, not commercial profit, was highly material. Indeed, had Gap disclosed "the true nature of the ISP program, Roots would never have agreed to pay $6 million for the OP inventory to acquire ISP rights." Abu Issa Decl. ¶ 7. This information was also uniquely within Gap's knowledge. The failure to disclose it was fraudulent.

Gap's was also obligated disclose the true purpose of the ISP program because Bell's representations about the ISP program were, on their own, misleading. Bell's failure to disclose "facts which materially qualify those stated" was fraudulent. *Vega v. Jones, Day, Reavis & Pogue*, 121 Cal. App. 4th 282, 294 (2004) (internal quotations omitted)

VI. The Record Supports Roots' Equitable Claims (Counts Seven, Eight, and Nine).

A. Roots' Equitable Claims Were Timely Filed.

Gap fundamentally misconstrues the events that trigger the running of the limitations period for Roots' promissory estoppel and quasi-contract claims. Gap's contention that the promissory estoppel claim is time-barred to the extent it is based on promises made prior to June 25, 2005, Defs. Mem. at 11, incorrectly assumes that a promissory estoppel claim accrues immediately when the promise is made. But a promise is only one element of the claim. The plaintiff must also plead: (1) reasonable and foreseeable reliance on the promise; and (2) a resulting injury. *See J.W. Van Hook v. Southern Cal. Workers Alliance, Local 17,* 158 Cal. App. 2d 556, 570 (1958). Roots' promissory estoppel claim did not accrue when Gap *made* its promises, but rather when Gap *breached* the promises, causing injury to Roots. *See Chambers v. Kay*, 106 Cal. Rptr. 2d 702, 719

(citing *Budd v. Nixen,* 6 Cal. 3d 195, 200-201 (1971)) ("Until the defendant's conduct causes damages to the plaintiff, no cause of action has been generated and the period of limitations is not triggered."). Thus, the statute of limitations for Roots' promissory estoppel claim began to run no earlier than August 10, 2005 – the date that Gap wrongfully terminated its ISP agreement with Gabana and ceased providing ISP merchandise to Roots.

"[A] suit for breach of an implied contract, which is the essence of a quantum meruit claim," likewise "accrues at the time of the breach." *Kramer v. Thomas*, No. CV 05-8381 AG, 2006 WL 4729242, at *14 (C.D. Cal. Sept. 28, 2006). As for the restitution claim, although Gap received various benefits at Roots' expense throughout the course of their business relationship, Gap's obligation to make restitution was not triggered until "the circumstances [were] such that . . . it [was] *unjust* for [Gap] to retain [the benefits]." *McBride v. Boughton*, 123 Cal. App. 4th 379, 389 (2004) (emphasis in original). Thus, Root's quantum meruit and quasi-contract/restitution claims likewise did not accrue before Gap cut off Roots' supply of first-line Gap merchandise in August, 2005.

All three claims were timely filed within two years of the date of accrual.

B. Gap Is Equitably Estopped From Invoking The Statute of Limitations Because It Induced Roots To Refrain From Filing Suit.

Gap's statute of limitations defense fails on the ground of estoppel. Under California law, a defendant who represents that "actionable damage has been or will be repaired, thus making it unnecessary to sue" is estopped from invoking the statute of limitations. *Lantzy v. Centex Homes*, 31 Cal. 4th 363, 383-384 (2003). The record shows that Gap promised that it would compensate Roots for its injuries, thus making it unnecessary for Roots to file suit. [redacted] Exh. F, 161:24–162:4. [redacted] *Id.* [redacted] *Id.*, 161:13–162:4. The record establishes that after Gabana brought its lawsuit, Gap persuaded Roots

not to file its own suit, by falsely asserting that it would cure Roots injuries by granting it franchise rights. Gap is therefore estopped from invoking the statute of limitations as a bar to Roots' equitable claims.

C. Roots' Promissory Estoppel Claim is Supported by the Record.

Gap's assertion that the record fails to establish "clear and unambiguous" promises that Gap made to Roots is untenable. Most notably, Gap promised to grant Roots the right to distribute first-line merchandise in the Arabic-speaking countries – a promise Gap breached when it cut-off Roots' access to ISP merchandise in August 2005.

The cases Gap relies on are easily distinguished. In *Aguilar v. Int'l Longshoremen's Union*, 966 F.2d 443, 446 (9th Cir. 1992), the court held that a union's representation to applicants that "job experience would be considered did not constitute a clear and definite promise that previous . . . experience would be the determinative factor. . . ." The court's holding that the plaintiffs could not "transform" their "inferences . . . into an enforceable promise," *id.*, has no application to Roots' claim. The defendant's vague promise in *B&O Mfg., Inc. v. Home Depot U.S.A., Inc.*, No. C 07-02864 JSW, 2007 U.S. Dist. LEXIS 83998, at *16-17 (N.D. Cal. Nov. 1, 2007), "to provide substantial quantities of future business" is far less definite and certain than Gap's promise to grant Roots ISP – and later franchise – rights for a specific product in a specified territory.

D. There Are No Written Agreements Covering The Same Subject Matter As Roots' Quasi-Contract and Promissory Estoppel Claims.

There is no written contract governing the rights Roots seeks to enforce in this action. Roots was not a party to the Gap-Gabana agreements, and it claims no rights under those agreements. The LOU, signed by Gabana and Roots in May 2003, was never implemented and the Gabana-Roots agreements contemplated by the LOU were never executed.

CONCLUSION

For the reasons stated above, the Court should deny Defendants' motion for summary judgment in its entirety.

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